

The Day After: Protecting the Human Rights Affected by Environmental Challenges After the EU Accession to the European Convention on Human Rights

Introduction

The opinion of the Court of Justice of the European Union (hereinafter CJEU) in 2014, fuelled the debate over whether the European Union (hereinafter EU) should accede the European Convention on Human Rights (hereinafter ECHR).¹ It suggested that the accession will undermine the autonomy of EU Law and the CJEU. But, the need for the reform of the human rights mechanism in Europe has been highlighted on several occasions over the past few decades. The accession of the EU to the ECHR will establish a balance between the different areas of law for all EU member states.² One such affected area will be the protection of human rights amidst environmental challenges. The increasing case law on environmental rights by the European Court of Human Rights (hereinafter ECtHR) and the CJEU, shows that there is still room for policy development in the area of ‘environmental rights’. The accession of the EU to the ECHR could be the answer to the protection of rights affected by environmental challenges, benefiting from the authority of the CJEU over EU Environmental Law and the extensive case law of the ECtHR on environment related applications. This will maintain a balance between the environmental policies of the EU and the commitments for a uniform human rights protection mechanism provided by the Council of Europe.

The article discusses the relationship between the two courts, as well as the development of human rights in the European communities. It examines the case law on ‘environmental rights’ of the CJEU and the ECtHR questioning their respective capacity to decide over such cases. It will be argued that application of EU environmental law and the external ‘specialist’ supervisory role of the ECtHR, would offer a more comprehensive form of protection of human rights affected by environmental challenges.

Reliance and hierarchy between the two Courts

The creation of what would later become the European Union (hereinafter EU), was primarily an economic endeavor, with little interest in the protection of human rights.³ In

¹ Opinion 2/13, Opinion pursuant to Article 218(11) TFEU – Draft International Agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement with the EU and FEU Treaties, judgment of 18 December 2014 ECLI: EU:C:2014:2454

² P Gragl, The accession of the European Union to the European Convention on Human Rights (Hart: Portland, 2013) 5

³ F. Van den Berghe, ‘The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?’ (2010) 16 ELJ 112

this respect, the EU does not have a complete human rights policy.⁴ The EU progressively promoted itself as an ‘ethical power’ with a renewed interest in ensuring the protection of human rights amongst Member States.⁵ However, the ability of the CJEU to decide over human rights claims has been repeatedly questioned.⁶ The developing human rights jurisprudence of the CJEU, as well as the challenges *Solange I* posed for the CJEU by the German Constitutional Court, generated the necessity for the EU’s accession to the ECHR.⁷ Despite the more favorable decision in *Solange II*, the first decision was considered a strike against the CJEU, since it is an implicit declaration of an inefficacy in protecting the human rights of citizens of Member States.⁸ It was then thought that the accession of the EU to the ECHR would have brought to an end the uncertainty of Member States of whether the CJEU efficiently protected human rights.

In 1974, the CJEU in *Nöld v Commission* accepted that the EU should follow the provisions of the ECHR as guidelines for human rights protection.⁹ In the same spirit, in *Rutili v French Minister of the Interior*, the CJEU referred to the provisions of the ECHR in regards to the control of aliens.¹⁰ The CJEU in both these cases gave an indication of reliance on the provisions of the ECHR making it clear that this was the first reference point for the protection of human rights in Member States. The CJEU later clarified that

It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR.¹¹

In relation to the ECtHR, there is a clear indication of an unwillingness to decide on potential human rights violations by the EU Institutions. Although Costello suggested

⁴ P. Alston and J.H.H. Weiler, ‘An ‘Ever Closer Union’ in Need of a Human Rights Policy’ (1998) 9 EJIL 660

⁵ J. Klabbbers, ‘On Myths and Miracles: The EU and Its Possible Accession to the ECHR’ (2013) Hungarian Y.B. Int’l L. & Eur. L. 45 See also L. Aggestam, ‘Introduction: ethical power Europe’ (2008) 84 International Affairs 1

⁶ C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1134

⁷ Ibid.

⁸ C-69/85 Wünsche v Germany [1986] ECR VIII-00517

⁹ C-4/73 Nöld v Commission [1974] ECR 985 para. 13 See also A Drzemczewski, ‘The Domestic Application of the European Human Rights Convention as European Community Law’ (1981) 30 ICLQ 118

¹⁰ C-36/75 Rutili v French Minister of the Interior [1975] ECR 1232. A similar approach was observed in the case of C-94/00 Roquette Frères [2002] ECR I-903; C-276/01 Steffensen [2003] ECR I-3777 on Right to a fair hearing; and C-105/03 Pupino [2005] ECR I-5332 See also Article 1 of Protocol 1-Right to property ECHR in C-44/79 Liselotte Hauer v Land Rheinland-Pfalz [1979] ECR 3744 paras 17-8. In C-13/94 P. v S. and Cornwall County Council [1996] ECR I-02143 para 15, the CJEU used the ECtHR interpretation of ‘transsexual’ in order to reach a decision in a case involving sex discrimination.

¹¹ C-112/00 Schmidberger v Austria [2003] ECR I-5659 para. 75

that the ECtHR has analysed actions of Member States following EU law,¹² in the case of *Matthews v UK*, in their joint dissenting opinion, Judges Sir John Freeland and Jungwiert expressed their concern over the ECtHR deciding a case involving the acts of the EU Institutions.¹³ In the case of *Senator Lines GmbH*, the applicant relying on *Matthews v UK*, claimed that the Court should be able to rule over the compatibility of the actions of EC Institutions with the ECHR provisions. To support this, the Council of the Bars and Law Societies of the European Union asserted that:

[T]he absence of access to the European Court of Human Rights, taken together with the absence of any standing in general for private individuals to challenge European Union acts, points to serious gaps in legal protection in the Union.¹⁴

This is true in the event that an individual brings an application against an EU institution interfering with human rights, or a Member State which following EU policy interferes with human rights, since the EU has not acceded the ECHR. For example, implementing EU policy for environmental protection may affect the right to property provided by the ECHR. The accession of the EU to the ECHR will allow individuals to bring applications before the ECtHR against EU Institutions as well as EU Member States.

A chronology of accession

The idea of the EU acceding the Convention goes back to the early stages of designing European integration.¹⁵ There was an obvious willingness on the part of the European Commission to proceed with such a development. This arguably silenced the criticisms over the alleged focus of the CJEU towards economic interests rather than human rights.¹⁶ The European Commission maintained this positive approach that this would enhance human rights protection in Europe and preserve the common cultural heritage of

¹² C. Costello, 'The Bosphorus ruling of the European Court of Human Rights: fundamental rights and blurred boundaries in Europe' (2006) 6 Human Rights Law Review 87 See *M. & Co. v Federal Republic of Germany* App no 13258/87 (Commission Decision, 9 February 1990) and *Karl Eckart Heinz v the Contracting States* party to the European Patent Convention insofar as they are High Contracting Parties to the European Convention on Human Rights, i.e. Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom App no 21090/92 (Commission Decision, 10 January 1994)

¹³ *Matthews v UK* App no 24833/94 (ECtHR, 18 February 1999). See also C. Rieder, 'Protecting Human Rights Within the European Union: Who is Better Qualified to Do the Job—the European Court of Justice or the European Court of Human Rights?' (2005) 20 Tul. Eur. & Civ. LF 80

¹⁴ *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* App no 56672/00 (ECtHR, 10 March 2004) The submissions of the third parties.

¹⁵ J. P. Jacqu  , 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 CML Rev. 995, on the 1953 ad hoc assembly of the European Coal and Steel Community

¹⁶ S. Douglas-Scott, 'A tale of two Courts: Luxembourg, Strasbourg and the growing European Human Rights Acquis' (2006) 43 CML Rev. 650

(Western) European countries, ultimately serving democracy.¹⁷ In 1990, the European Commission observed that the gap between the mechanisms of human rights protection between the EU Member States and the EU itself could be eliminated by a possible accession of the EU to the ECHR.¹⁸

Prior to the Lisbon Treaty,¹⁹ the CJEU repeatedly mentioned the provisions of the ECHR. This intended to eliminate the gaps that could be created through the different case-law of the two courts and ensure uniformity of human rights protection. ‘The Court of Justice of the European Union has used the European Court of Human Rights jurisprudence as an interpretative tool with respect to the lawfulness of acts and omissions of EU institutions and organs.’²⁰ The mention of the ECHR provisions by the CJEU does not imply that it is bound by the ECtHR case-law. It simply means that the mention of the case law and the ECHR’s provisions alongside other international instruments, serves as a point of reference on human rights protection. The Treaty of Lisbon while proclaiming the Charter of Fundamental Rights legally binding and through Article 6(1) and Article 6(2) provided that ‘[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession will not affect the Union’s competences as defined in the Treaties’.²¹ Article 6 illustrates a desire to ensure a uniform protection of human rights across Europe.

There is evidence of the CJEU’s resistance to the notion of the accession since the early stages of the accession discussion. The CJEU held in 1996 that taking into account the circumstances at the time, the Union did not have the competence to accede to the ECHR. By examining the possibility of accession under Article 235 (now Article 308) of the EC Treaty, the CJEU concluded that the Article did not confer for such widening of the Union’s functions, therefore, the Article could not be interpreted as providing for an accession to the ECHR.²²

Currently, the common Member States of the Union and the Council of Europe, implementing EU law in their domestic systems, are also bound by the provisions of the ECHR. In the event of a fulfilment of the accession, human rights protection across Europe would be strengthened. According to Howells

Firstly, accession would ensure that, in addition to the Charter’s internal protection, an external judicial review by the Strasbourg Court of human rights protection is assured. Secondly, with the Convention becoming legally binding upon the Union, any potential divergences between fundamental rights and rights protected by the Convention can be prevented. Thirdly, EU

¹⁷ Commission of the European Communities, Commission Communication on Community accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols, SEC(90) 2087

¹⁸ Ibid.

¹⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, 13 December 2007, OJ 2007/C 306/01

²⁰ See Gragl, above n. 2 at 54

²¹ Above n. 19

²² Opinion 2/94, Opinion Delivered on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1996] ECR I-01759

citizens would finally be able to bring cases against the organs of the EU directly to the Strasbourg Court.²³

The most simplified mapping of how the accession will affect the relationship between the two courts, suggests that whether proceedings should be brought against a Member State or against the EU, depends on the discretion of member states on how to implement EU law,²⁴ and whether the potential violation derives from the implementation strategy of EU law itself. When in doubt, the ECtHR should make that decision.²⁵

The Draft Agreement on the Accession of the European Union to the Convention on the Protection of Human Rights and Fundamental Freedoms of 2011, stated that the accession of the EU to the Convention would serve the enhancement of human rights protection in Europe.²⁶ Article 1(2)(c) provides that

Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regards only to acts, measures or omissions of its institutions, bodies, office or agencies, or of persons acting on their behalf. Nothing in the Convention or the Protocol thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.

Following the Draft Agreement, the CJEU opinion raised concerns relating mostly to the protection of the CJEU's autonomy.²⁷ Firstly, although there is nothing to forbid the external control that will be afforded following the accession, and subject to this not affecting the autonomy of the EU legal order, the judgment of *Melloni* suggested that national standards of human rights protection should not affect the level of protection provided by the Charter.²⁸ This runs contrary to Article 53 of the ECHR, which allows Member States to provide higher standards of protection than those provided by the ECHR. To eliminate this clash of provisions, the CJEU suggested that Article 53 ECHR and Article 53 of the Charter should be coordinated to ensure that the autonomy of the EU legal order is not compromised.²⁹ Secondly, and in the same spirit of fear over the future autonomy of EU law, the CJEU suggested that the principle of mutual trust amongst EU Member States would be compromised given that the EU will be a member of the ECHR in the same position as Contracting States which are not EU Member States and not part of this principle.³⁰ Thirdly, the CJEU identified a potential clash between the system provided by Protocol No 16 ECHR and Article 267 TFEU of preliminary rulings. This would adversely impact on the autonomy of the preliminary ruling

²³ R. Howells, 'The EU and the ECHR Protocols – a Critique of 'Selective' Accession' (2016) N.E.L.Rev. 133

²⁴ Article 288 of the Treaty on the Functioning of the European Union

²⁵ See Gragl, above n. 2 at 143

²⁶ Council of Europe, '8th Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission' CDDH-UE(2011)16, 2

²⁷ Opinion 2/13, above n. 1

²⁸ C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] (EU:C:2013:107)

²⁹ Opinion 2/13, above n. 1 at paras 185-90

³⁰ Opinion 2/13, above n. 1 at paras 191-5

procedure.³¹ Fourthly, the draft agreement allows for the EU and Member States to bring an application under Article 33 of the ECHR before the ECtHR against another Member State or the EU. According to the CJEU, this would undermine the objective of Article 344 TFEU.³² Fifthly, the co-respondent mechanism allowed by Article 3(5) of the Draft Agreement, was challenged due to the competence of the ECtHR to invite or extend an invitation to a contracting Party, capable of '[interfering] with the division of powers between the EU and its Member States'.³³ Sixthly, the CJEU suggested that the prior involvement procedure undermines the characteristics of the EU and EU law, since the CJEU will not be allowed to rule on the interpretation of an EU provision.³⁴ Finally, the CJEU recognised that the Draft Agreement shows disregard towards the 'specific characteristics of EU law' in relation to judicial review in Common Foreign and Security Policy matters.³⁵ The Opinion was not immune to criticism. Isiksel argues that the CJEU is overconfident that the EU has risen above any 'political or institutional defects' that could lead to violations of human rights. Such overconfidence is a reason to demand that the CJEU is kept under 'checks and balances'.³⁶ Coming under the external control of a 'human rights specialist' ECtHR will serve legal certainty rather than undermine EU autonomy.³⁷ A coherent approach to human rights protection in Europe is necessary, given how the EU through the Copenhagen criteria requires the ratification of the ECHR therefore recognising the significance of the framework.³⁸

'Environmental rights' before the Court of Justice of the European Union

Prior to the enactment of the EU Charter of Fundamental Rights, the CJEU created a list of rights that reflected the commitment of the EU to human rights protection. The ECtHR through its jurisprudence and its interpretation of the ECHR's articles, offered guidelines to the CJEU on deciding human rights cases. This relationship between the two Courts is present after the enactment of the EU Charter as well. Initially the EU Charter of Fundamental Rights was only used as a point of reference. When the Lisbon Treaty was enacted in 2009, it was given the same legally binding status as the Treaties.³⁹ It imposes obligations on the institutions of the European Union for human rights protection, and not

³¹ Opinion 2/13, above n. 1 at paras 196-200

³² Opinion 2/13, above n. 1 at paras 201-14. Article 344 TFEU provides that Member States can only settle disputes over the interpretation and application of the Treaties before the CJEU.

³³ Opinion 2/13, above n. 1 at para 225. The 'co-respondent mechanism' suggests that other Member States could be co-respondents with another Member State and/or the EU in an application alleging a violation of ECHR provisions.

³⁴ Opinion 2/13, above n. 1 at para 236-48

³⁵ Opinion 2/13, above n. 1 at para 249-57

³⁶ T. Isiksel *European Exceptionalism and the EU's Accession to the ECHR* (2016) 27 EJIL 565

³⁷ H.C. Kruger, 'Reflections Concerning Accession of the European Communities to the European Convention on Human Rights' (2002) 21 Penn St. Int'l L. Rev. 96

³⁸ EU accession criteria

³⁹ W. Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon' (2011) 7 European Constitutional Law Review 64

on its member states.⁴⁰ The Charter is considered a modern instrument for human rights protection addressing issues of bioethics as well as sustainable development. This comes as no surprise considering the time of its creation, and the general knowledge and technological advancement witnessed since the creation of the ECHR. Comparing the Charter to the ECHR and taking into account the time gap separating their creations, the Charter may seem like the most appropriate instrument for addressing ‘environmental rights’ issues, since the demand for the protection of environmental rights has emerged more recently.

Currently a combination of the EU Charter of Fundamental Rights and EU Environmental law is used to protect combined interests at an EU level. Although, the efficacy of the CJEU in deciding over human rights matters has been challenged in the past,⁴¹ the CJEU has decided cases raising environmental and human rights concerns. These cases are mostly based on the Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters (hereinafter Aarhus Convention), which explicitly provides for the protection of procedural rights concerning environmental protection.⁴² ‘Procedural environmental rights’ as provided by the Aarhus Convention implemented by directives and the CJEU through the procedure of the preliminary rulings, were expected to be protected when enforcing EU Environmental Law.⁴³

The overall approach of the CJEU towards human rights affected by environmental challenges cannot be considered as satisfactory, so as to assume that there is no need for a development in the area. In the case of *Seaport (NI) Ltd*, the Advocate General stated in his advisory opinion that Article 37 of the EU Charter, as well as Article 174 of the EC Treaty, provide for everyone’s right to live in an ‘environment suitable for ensuring their health and well-being’,⁴⁴ associating environmental protection with human rights by way of interpreting the Articles.⁴⁵ The AG connected the article to the Aarhus Convention, emphasising the importance of safeguarding procedural rights in order to protect substantive rights to the environment. The Advocate General’s opinion in *Commission v Italy* was in the same spirit.⁴⁶ Mr Advocate General Ruiz-Jarabo Colomer pointed out that Article 37 of the EU Charter sets out responsibilities that the EU and its Member States have to fulfil in achieving an environment of quality. In a case involving

⁴⁰ E.C. Landau, ‘A regime of Human Rights in the EU’ (2008) 10 Eur. JL Reform 562

⁴¹ C. Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’ (2013) 76 MLR 254

⁴² Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus. Denmark, 25 June 1998. The Aarhus Convention provided for the protection of ‘environmental procedural rights’ whose protection is considered crucial to the overall protection of the environment and therefore an implicit recognition of an ‘environmental right’.

⁴³ See E. Hey, ‘The interaction between human rights and the environment in the European ‘Aarhus Space’ in A. Grear and L. J. Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing: Cheltenham, 2015) 353

⁴⁴ Consolidate Version of the Treaty establishing the European Community, signed in Nice, 14 December 2002, OJ 2002/C325/33, Part Three: Community policies-Title XIX: Environment, Article 174

⁴⁵ Opinion of Advocate General, C-474/10 *Seaport (NI) and Others v Department of the Environment for Northern Ireland* [2011] ECR I-10227 para 27

⁴⁶ Opinion of Advocate General Ruiz-Jarabo Colomer C-87/02 *Commission v Italy* ECR [2004] I-05975

procedural rights, the Advocate General emphasised the importance of assessing environmental effects of all projects, and the disclosure of all the relevant information about the procedure of assessment.⁴⁷

In relation to procedural rights, the Greenpeace case raises a vital issue for the protection of rights linked to the protection of the environment; the protection of the right to receive information on projects affecting the environment. This right is also covered by the Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters.⁴⁸ The Aarhus Convention has been a point of reference in resolving the issue of *locus standi* before the CJEU since its jurisprudence indicates that NGOs could not bring cases before it. The reluctance to apply the Aarhus Convention suggests that the CJEU is even less likely to act decisively to protect substantive environmental rights, especially in the absence of any explicit protection in EU law. It has been also argued that: 'The ECJ is likely to find itself increasingly called upon to achieve a balance between two of the Union's objectives: economic development and environmental protection'.⁴⁹ The capacity of the CJEU to protect human rights has been repeatedly called into question. The accession will allow the ECHR to 'supervise' the EU when it comes to human rights issues. As Thorbjørn Jargland said, the accession 'will contribute to the creation of single space, putting in place the missing link in the European system of fundamental rights protection'.⁵⁰ Therefore, the ECtHR should be the responsible court for protecting 'environmental rights', since it focuses on people's rights rather than economic interests. The Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, shows a shift from an intention to accede to the ECHR to the creation of the relevant framework in order for the EU to accede to the ECHR.

'Environmental rights' in the European Court of Human Rights

Contrary to the EU Charter of Fundamental Rights, the ECHR does not include a consideration of environmental factors. Thus, the existing wording of the ECHR was interpreted in order to decide on these applications. These were interpreted to reflect

⁴⁷ Ibid.

⁴⁸ The Aarhus Convention is the first legally binding document in International Law guaranteeing environmental procedural rights. This document, provided for at least some aspects of the protection of human rights affected by environmental challenges, aiming also at environmental protection, in compliance with its articles, promotes the protection of procedural rights for future generations, and addresses empowerment as part of environmental justice. See also C. Nadal 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a "Pillar" of Empowerment' (2008) 10 Environmental Law Review 32-33

⁴⁹ P. Sands, 'European Community Environmental Law: Legislation, the European Court of Justice and Common-Interest Groups' (1990) 53 MLR 686

⁵⁰ Council of Europe, Milestone reached in negotiations on accession of EU to the European Convention on Human Rights, Press release-DC041(2013)

mostly rights relevant to health risks and the access to environmental information.⁵¹ The ECtHR was by no means progressive. Since 1969 when *Dr S. v the Federal Republic of Germany* was heard in the European Commission of Human Rights, the ECtHR has taken very slow steps in recognising that firstly, the quality of the environment can affect one's private and family life,⁵² and that there is a need for people to be informed over the quality of their environment.⁵³ There was more willingness to address these claims under Article 8 – Right to Private and Family Life rather than Article 2 – Right to Life, even in cases of severe health impairment. The wording of the Article 8 allowed for maintaining a fair balance between individual rights and the community's interests as a whole. This balance was of great relevance when it came to weighing environmental protection and protection of human rights against economic growth. Article 8 also accommodates positive obligations towards protecting the rights against environmentally hazardous circumstances.⁵⁴ The ECtHR drawing inspiration from the Aarhus Convention, identified within the ECHR's provisions a positive obligation to provide information on environmental matters in order to protect substantive rights as seen in the cases of *Öneryildiz*.⁵⁵

In addition, the ECtHR's favouring of a wide margin of appreciation to states in cases under Article 8, is of great significance. The ECtHR has mentioned that national courts are generally in a better position to assess whether a said action was necessary for the wellbeing of a state, whether this leads to a better protected environment or not.⁵⁶ This has allowed Member States to choose whether environmental pollution was allowed in order to protect economic interests, or to allow interference with individual rights in order to protect the environment.⁵⁷ The difficulties over protecting human rights to the environment with the current form of the ECHR are evident from the ECtHR's jurisprudence. The case of *Otgon v Republic of Moldova* shows the variation of interpretations -lack of uniformity- of Article 8 on issues of risks to health caused by environmental pollution.⁵⁸ The applicant claimed that the compensation offered to her family for the physical and mental damage suffered following the consumption of contaminated water, was not enough. The ECtHR decided that the compensation offered for a found violation of Article 8 was disproportionate to the harm suffered, leading to a violation of her right to private and family life, 'since her physical integrity has been affected by an unhealthy environment'.⁵⁹ The dissenting opinion criticises the connection of health risks to Article 8, a long-lasting issue with the ECtHR's approach to environmental concerns. According to Judge Lemmens 'any damage to a person's health

⁵¹ Dissenting opinion of Judge Lemmens in *Otgon v the Republic of Moldova* App no 22743/07 (ECHR 25 October 2016).

⁵² *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994)

⁵³ *Guerra and Others v. Italy* App No 14967/89 (ECHR, 19 February 1998)

⁵⁴ *Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009)

⁵⁵ *Öneryildiz v Turkey* App no 48939/99 (ECHR, 30 November 2004)

⁵⁶ E. Desmet, *Balancing Conflicting Goods-The European Human Rights Jurisprudence on Environmental Protection*, (2010) 7 *Journal for European Environmental & Planning Law* 308

⁵⁷ *Hatton v the United Kingdom* App no 36022/97 (ECHR, 8 July 2003)

⁵⁸ *Otgon*, above n. 51

⁵⁹ *Ibid.* para 17

[does not] attract the applicability of Article 8. For that provision to be applicable, there should be repercussions on the affected person's private life'.⁶⁰

This is in direct contrast with the ECtHR's approach to previous cases of risks to health and its possible link to Article 8 rather than Article 2. One would recall the concurring opinion of Judge Jambrek in *Guerra v Italy*, where it was highlighted that it was time for the ECtHR to evolve and interpret Article 2, rather than the applied Article 8, to include different situations of risk against life, other than those initially intended to tackle.⁶¹ In 1998, Judge Jambrek asked for a wider interpretation of Article 2, in order to include health impairment and risk to life caused by environmental pollution. In 2016 Judge Lemmens, asked for a more 'restrained approach to the scope of application of Article 8'.⁶² The uncertainty over which Article is better suited for protecting health amidst environmental challenges, is evidence of the need for an explicit protection of rights when these are affected by environmental degradation.

The differential application of different ECHR articles is similarly observed on the issue of risks to possessions by environmental challenges as well. The applicants in *Öneryildiz* successfully claimed a violation of their rights under Articles 8 and 1 of Protocol 1 for the loss of their movable property during a methane explosion, for which they did not receive compensation. In this case, the applicants lived in a slum quarter in a refuse-tip illegally. Although the ECtHR accepted that the house was built illegally, the structure, fittings and fixtures represented significant economic interest and came under the protection of Article 1 of Protocol 1.⁶³ The government submitted that compensation for lost property which was illegally erected on public land, would amount to a reward for acting unlawfully. Nevertheless, the ECtHR revisited the meaning of 'possessions' within the wording of Article 1 of Protocol 1, to include 'a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right'.⁶⁴ The ECtHR concluded that failure to act in order to protect the applicants' possessions from a methane explosion, was a violation of the applicants' rights under Article 1 of Protocol 1. The destruction of property through an environmental disaster would come under the spectrum of Article 1 of Protocol 1, while Article 8 was not separately examined. This decision is a puzzling one, given how the property was erected illegally, and the applicant was fully aware of the status of this property.

This is more evident when comparing *Öneryildiz* to *Depalle v France*. In the latter case, a retired couple bought a property on the beach which included a house and a dyke built illegally 100 years before.⁶⁵ The State served a notice requiring the demolition of the house and restoring the area to its original state without receiving compensation. The argument was that the house obstructed the right of access to public maritime

⁶⁰ Above n. 51

⁶¹ Concurring Opinion of Judge Jambrek in *Guerra*, above n. 53

⁶² Above n. 51

⁶³ Above n. 55 para 121

⁶⁴ *Ibid.* at para 124

⁶⁵ *Depalle v France* App No 34044/02 (ECHR, 29 March 2010)

property and was contrary to national laws related to the protection of coastal areas.⁶⁶ The applicants claimed a violation of Article 1 of Protocol 1 relying on the definition of “possessions” given in *Öneryildiz*⁶⁷

The concept of ‘possessions’ ... is not limited to the ownership of physical goods and is independent from the formal classification in domestic law... The concept of ‘possessions’ is not limited to ‘existing possessions’ but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and legitimate expectation of obtaining effective enjoyment of a property right.⁶⁸

Although the house was bought in good faith, the ECtHR decided that there was no violation of the right to enjoyment of property. The outcome of the fair balance test was favourable towards the State and the State had a duty to control the use of property if this satisfied a legitimate aim.⁶⁹ The fact that no compensation was offered, was not considered by the ECtHR as a reason for a violation of Article 1 of Protocol 1. Judge Casadevall, in his concurring opinion, stated that although ‘possessions’ as a concept includes the expectation of enjoying these possessions, Article 1 of Protocol 1 clearly provides that this should be done in accordance with national law.⁷⁰ The same opinion was expressed in *Öneryildiz* by Judge Mularoni in his partly dissenting opinion.⁷¹

Given the extreme circumstances in the case of *Öneryildiz*, it is likely that this affected the ECtHR in deciding in favour of the applicant, contrary to the later decision in *Depalle*.⁷² Although the ECtHR has compared facts in Article 8 environmental claims in order to ascertain whether environmental degradation was enough to interfere with the enjoyment of Article 8 rights, Article 1 of Protocol 1 did not require such an exercise. It seems unjustified that these two cases had different outcomes in relation to Article 1 of Protocol 1. This strengthens the assumption that there is a lack of uniformity in decision making, which impedes the adoption of a more even approach towards environmental challenges and human rights by the ECtHR.

Another criticism over the ECtHR’s jurisprudence is the fact that substantive rights were seen as dependent on the protection of procedural rights. This ‘proceduralisation’ of the rights affected by environmental factors was seen as an effort directed at people’s empowerment in relation to environmental decision making, ultimately ensuring the protection of substantive rights to the environment (i.e. right to life and right to private and family life).⁷³ This is identified as a flaw, since environmental protection requires the protection of procedural rights as well substantive

⁶⁶ Ibid. at para 16

⁶⁷ Ibid. at para 56

⁶⁸ Above n. 55 at para 63

⁶⁹ Above n. 65 at para 81

⁷⁰ Concurring opinion of Judge Casadevall in *Depalle*, Above n. 65 at para 1

⁷¹ Partly Dissenting opinion of Judge Mularoni in *Öneryildiz*, above n. 55

⁷² *Depalle*, above n. 65

⁷³ F. Francioni, *International Human Rights in an environmental horizon*, (2010) 21 EJIL 42

rights.⁷⁴ Instead the ECtHR interpreted the procedural aspects to be a prerequisite to protecting substantive rights. The protection of procedural rights, should have been independent from a substantive right based claim.⁷⁵ For example, whilst the protection of the right to receive information on environmental matters is considered pivotal to the protection of Article 8 and Article 2 rights, it should be protected, whether or not a natural disaster eventually occurs which could lead to further interferences with Articles 8 and 2.

In general, the case-law of the ECtHR related to ‘environmental rights’ is unclear. The increase of environmental cases decided in ECtHR, did not lead to a more progressive approach by the ECtHR compared to the CJEU. The area might be clarified in case of an accession, given how the implementation of EU environmental law and the Aarhus Convention with the external control of the ECtHR might lead to better protected ‘environmental rights’. In case the EU accedes the ECHR, individuals would be able to bring complaints before the ECtHR against EU institutions for failure to comply with the Aarhus Convention corresponding directives and EU environmental law, raising claims based on the provisions of the ECHR. This means, that the proposed protocol and the Aarhus Convention in relation to procedural rights would allow further clarity.

The day after the accession for ‘environmental rights’

Whether falling under the jurisdiction of the ECHR or the EU Charter, issues of supremacy have to be examined; which court should be responsible for protecting human rights in Europe as well as which court is in the best position to deal with human rights interferences by environmentally challenging circumstances. The ECtHR has been a very efficient institution for human rights protection relying on the ECHR. The CJEU has traditionally dealt with environmental protection through EU law. The accession of the EU to the ECHR will allow individuals to bring applications before the ECtHR against EU Institutions. Eckes is positive over the good effects that this accession would have on the protection of human rights in Europe, contrary to other bleak suggestions over the potential complexity of the situation if this accession gets completed.⁷⁶

Currently any implementation of EU Law by ECHR contracting states, including EU environmental law has to comply with the provisions of the ECHR. At the moment, it is difficult to distinguish which domestic legislation derives directly from EU environmental law. But ratification of the ECHR requires that this implementation is compliant with human rights provisions. The potential accession of the EU to the ECHR will mean that implementation of EU Environmental Law will be compliant to the ECHR’s provisions on human rights and bound by the decisions of the ECtHR.

⁷⁴ R. Pavoni, ‘Environmental Jurisprudence of the European and Inter-American Court of Human Rights’, in B. Boer (ed.) *Environmental Law Dimensions of Human Rights* (OUP: Croydon, 2015) 69

⁷⁵ Ibid.

⁷⁶ European Commission, *Report on the Application of the EU Charter of Fundamental Rights*, COM(2017) 239 3

When a matter does not relate to EU Law, then it is the Member States' responsibility to ensure that they comply with their own obligations under human rights law.⁷⁷ The report on the application of the EU Charter of Fundamental Rights, clarifies that commitments of Member States under the ECHR are independent of their commitment under EU Law.⁷⁸ An application that raises human rights concerns over EU Law, will not be addressed towards the EU Institutions but towards the implementing Member State instead.

The EU accession to the ECHR will have three benefits. The accession will allow the ECHR's principles legally binding for the EU Institutions. This will mean that there would be a uniformity of human rights protection amongst the two courts. Secondly, although the Charter of Fundamental Rights protects human rights, the accession will allow for external supervision in the form of a judicial supervision over the EU and its institutions. Finally, and most importantly, the system of individual applications before the ECtHR will allow individuals to bring applications against the EU and its Institutions.

Conclusion

The ECtHR has decided cases bringing environmental concerns to the forefront of human rights protection, relying on the provisions of the ECHR and seeking inspiration from international instruments such as the Aarhus Convention. These cases were a manifestation of the interdependent relationship between environment protection and the enjoyment of fundamental human rights. These range from complaints over alleged human rights violations due to environmental degradation to alleged human rights interferences through the enforcement of environmental protection policies.⁷⁹ On the other hand the CJEU has also decided cases raising environmental and human rights concerns. These cases are mostly based on the Aarhus Convention but there is evidence of an inability to balance these human rights considerations in light of the original economic role of the EU.

Despite the delay in the developments relating to the potential accession of the EU to the ECHR by the CJEU opinion of the Draft Agreement for the Accession of the EU to the ECHR, the combined application of the Aarhus Convention with the ECHR, will serve the better protection of 'environmental rights'. There will be a uniform protection of procedural and substantive 'environmental rights' across Europe and more clarity over how a complainant can bring a claim for 'environmental rights' violations against the European Union Institutions and EU Member States. The general consensus amongst scholars is that the accession will benefit the uniform protection of human rights across Europe '[contributing] to the creation of a single legal space, putting in place the missing link in the European system of fundamental rights protection'.⁸⁰ Taking

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ See for example Tătar, above n. 54

⁸⁰ Above n. 50

advantage of the CJEU expertise in applying EU Environmental Law and the Aarhus Convention implementing directives, together with the now extensive experience of the ECtHR in deciding over environmentally related applications, the accession will ultimately allow a more transparent area around the protection of rights when affected by environmental challenges in Europe.